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Before The  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

DEC 19 1991

Federal Communications Commission  
Office of the Secretary

In the Matter of )  
 )  
Review of the Policy Implications )  
of the Changing Video Marketplace )

MM Docket No. 91-221

ORIGINAL  
FILE

REPLY COMMENTS OF  
THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.

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December 19, 1991

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## SUMMARY

In their initial comments in this proceeding, several broadcasters seize upon the opportunity to present a bleak picture of their ability to compete in the video marketplace. They sound dire warnings about the loss of public interest programming unless new regulatory requirements are imposed on cable television.

While it may serve broadcasters' own deregulatory agenda to portray themselves here in dire straits, there is no evidence that the future viability of television broadcasting is at all threatened. Nor is there any evidence, even assuming a decline in broadcasters' competitive status in the marketplace, that protectionist measures -- such as must carry rules or retransmission consent requirements -- are at all warranted; and imposing unjustifiable requirements on cable's carriage of local broadcast stations is not the solution to broadcasters' problems.

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The National Cable Television Association, Inc. ("NCTA"), by its attorneys, hereby submits its reply comments in the above-captioned proceeding.

INTRODUCTION

The Commission commenced this Notice of Inquiry to obtain comments on the state of the video marketplace and the implications for its regulatory policies. The Commission specifically sought comment on the findings of its Office of Plans and Policy ("OPP") which, among other things, concluded that television broadcasting has experienced "an irreversible long-term decline in audience and revenue share, which will continue throughout the current decade."<sup>1/</sup> The OPP Report recommends that the Commission eliminate certain restrictions on broadcasters in order to enhance their position in the competitive marketplace.

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<sup>1/</sup> OPP Report at vii.

In our initial comments in this proceeding, we recognized that to the extent the record demonstrates that existing regulations no longer serve any valid purpose and, moreover, are found to unduly constrain broadcasters' ability to compete, elimination of such rules may be in order.<sup>2/</sup> There is, however, no basis for adopting new rules designed specifically to protect or subsidize broadcasters in the face of competition in the video marketplace. Broadcaster profits in a competitive marketplace may be smaller than when broadcasting ruled the roost as the sole provider of video programming. But such declines demonstrate only that competition is working, not that broadcasting is "on the ropes" or, as the National Association of Broadcasters maintains, that protectionist subsidies -- in the form of must carry or retransmission consent rules -- are vital to the survival of "universal free service".<sup>3/</sup>

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2/ The network-cable crossownership ban may be one rule that has outlived its original purpose, and we did not oppose its removal. Capital Cities/ABC, for one, has proposed repeal of the rule, but has also suggested in its comments that the Commission consider adoption of certain safeguards. Since the Commission has recently announced the commencement of a Second Further Notice of Proposed Rulemaking on the issue of network/cable crossownership, including the question of whether safeguards are necessary, NCTA will reserve comment until it has an opportunity to review the FCC's proposal.

We continue to believe that before the Commission recommends that Congress eliminate the broadcast-cable crossownership ban, which was reevaluated and codified by Congress only seven years ago, it should take a hard look at whether such crossownership still poses a direct threat to diversity and competition in the local video marketplace.

3/ Comments of NAB at 3.

I. Television Broadcasting Continues to Be a Healthy Industry.

Several broadcast commenters have seized upon the opportunity presented by this Notice of Inquiry to paint gloomy pictures of the broadcast industry, and sound dire warnings about the loss of public interest programming unless new regulatory requirements are imposed on cable television. CBS, for example, warns that there are "grave difficulties ahead for the free broadcasting industry -- and for its audience -- if it must continue to compete with multichannel pay services while remaining subject to an outdated regulatory structure."<sup>4/</sup> NAB alleges that "the change to a multi-channel programming environment brought about by the growth of cable systems and cable networks threatens the future viability of over-the-air television stations and broadcast networks."<sup>5/</sup> And the Network Affiliated Stations Alliance ("NASA") claims that competition "has decreased the advertising revenues required to fund the local news and public interest programming that forms the basis for the American system of free broadcasting."<sup>6/</sup>

While it may serve the broadcasters' own deregulatory agenda to portray themselves in dire straits in this proceeding, there is no evidence that the future viability of television

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4/ Comments of CBS Inc. at 2.

5/ Comments of NAB at 2.

6/ Comments of NASA at 5.

broadcasting is at all threatened. NCTA in its initial comments cited statements of NAB in another recent proceeding in which the industry touted its financial health. Other non-broadcast commenters in this proceeding confirm the assessment that television broadcasting remains a sound industry. MPAA, for example, shows that in the main, "commercial broadcast TV stations continue to fetch attractive prices in the resale market";<sup>7/</sup> that due to the growth in viewing audience "even with stagnant or marginally declining audience shares, broadcast stations continue to reach by far the largest audiences among all video media";<sup>8/</sup> and that analysts predict that television stations in five years will continue to dominate viewing and to command the lion's share (more than 90 percent) of total television advertising.<sup>9/</sup> A study by the Office of Communication of the United Church of Christ ("OC/OCC") similarly confirms that "advertising revenues have increased for each sector of the television industry despite marketplace competition."<sup>10/</sup> This trend continued despite loss of viewing shares by the television industry.

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7/ Comments of MPAA at 4.

8/ Id. at 5-6.

9/ Id. at 9.

10/ Comments of OC/UCC at 4 (emphasis in original.)

Not only broadcast stations but also broadcast networks are clearly holding their own in the video marketplace. Information released since initiation of this Notice of Inquiry shows that network television programming costs have flattened out.

According to a recent Broadcasting article:

The truth about programming costs surprises even some network executives. Like outside observers, they assume the programming budget is drawn ever upward by the pull of a Cosby renewal, the bidding for new sports contract or other big ticket items. For the most part, the networks are happy to let stand that misimpression: in lobbying or negotiating it helps them play the aggrieved party more convincingly. But the truth, according to some recent evidence from the networks, is that programming costs really have not increased that much, if at all.<sup>11/</sup>

Perhaps ABC News President Roone Arledge best summarized the reality of the network business in recently commenting: "all this talk about the networks are dead! . . . It's nonsense! The best day at a cable channel doesn't come near what a network does . . . The networks no longer reach 95 percent of the people, . . . but they reach 65 percent, which is awesome."<sup>12/</sup>

In the face of this evidence, the Commission should view skeptically the claims that some radical restructuring of its regulatory scheme is necessary to ensure broadcasting's very

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11/ Broadcasting, Dec. 9, 1991 at 3 (emphasis supplied). In contrast, cable television system expenditures for basic cable programming have risen by 13.7 percent during 1991 alone.

12/ "Live from Washington . . . It's Broadcasting Magazine's Hall of Fame", The Washington Post, Dec. 11, 1991 (emphasis supplied).



survival. But even assuming that television broadcasting is experiencing a decline, this supposed decline should not be used as a pretext to adopt the protectionist measures that certain broadcasters advocate. Broadcasting's status in the admittedly more competitive marketplace is hardly a function of the historical or current regulatory treatment of cable television. As OC/UCC points out, "contrary to OPP's conclusions, competition from cable TV has not been the primary cause of lower profits. The television industry's ability to achieve revenue growth year after year for the past 10 years has been impervious to increased competition."<sup>13/</sup>

II. Broadcasters Paint a Distorted Picture of the Relationship Between Broadcast and Cable Television In An Attempt to Bolster Their Protectionist Claims.

In addition, broadcasters create a revisionist history of the Commission's regulatory policies and its effect on the current video marketplace in an attempt falsely to paint cable television retransmission of broadcast stations as the source of their problems -- and retransmission consent or must carry rules as the solution. They invent a wholly fantastic scenario in which, according to NAB, "existing broadcasters subsidized the creation of their competitors."<sup>14/</sup> One would never know from a review of the "history" set forth by NAB that for two decades,

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<sup>13/</sup> Comments of OC/UCC at 6.

<sup>14/</sup> Comments of NAB at 3.

cable operators -- at broadcasters' insistence -- were required to carry every local broadcast station in its entirety, up to a system's entire channel capacity. Indeed, it was true that no cable system was required to obtain the consent of local broadcast stations in order to carry them; because, instead, the Commission had imposed a regulatory scheme in which the cable operators were required to carry them.<sup>15/</sup>

Under these circumstances, it is disingenuous at best to claim, as do NAB and others, that broadcasters "subsidize[d] the development of cable systems."<sup>16/</sup> To the extent that such policies resulted in any "subsidy", it was adopted at broadcasters' urging and subsidized them.

### III. Imposing Retransmission Consent Would Grant Broadcasters An Additional Subsidy At the Expense of Diversity.

NAB creates its "subsidy" argument in an attempt to justify imposition of a retransmission consent surcharge on cable operators and their subscribers. Broadcasters essentially contend that they should be considered program suppliers to the

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15/ Furthermore, the Commission viewed non-duplication rules as a remedy for its inability to impose retransmission consent -- rules that continue to be enforced under current cable regulation. First Report on Microwave Relays (Dockets 14895, 15233), 4 RR 2d 1725, 1752 n.37 (1965) ("[W]e believe that reasonable non-duplication requirements will serve, in part, to achieve the equalization of competitive conditions at which the 'rebroadcasting consent' proposal is, in large part, aimed.")

16/ Comments of NAB at 11; see also Comments of INTV at 10 ("[t]he Commission permitted massive subsidization of the cable industry by broadcast television.")

cable industry, and should be paid accordingly. They urge that the way to save "free TV" is to force viewers to pay for it.

Broadcasters, however are not just like cable program services. Broadcasters, unlike other program distributors, are granted free access to a valuable public resource -- the spectrum -- enabling them to reach viewers over the air. In return for this free spectrum, they are both required to provide their signal free to their entire community (and hence obtain their revenues not from subscribers, but from advertisers), and to provide local and public service programming.

NAB and its members are well aware of this regulatory quid pro quo. Its President went so far as to claim that requiring broadcasters to pay for use of the spectrum in the form of spectrum auctions would "dissolve a contract among broadcasters, the government, and the public."<sup>17/</sup> But other than free access to the valuable spectrum, little of this so-called "contract" remains. As we described in our Petition for Rulemaking<sup>18/</sup> and in our initial comments in this proceeding, broadcasters have already abandoned their public interest obligations. This is confirmed by OC/UCC's comments in this proceeding, which demonstrate that since deregulation, the television industry has

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17/ CableFax, Oct. 21, 1991 (quoting NAB President Eddie Fritts before the Senate Communications Subcommittee.)

18/ Comments of NCTA, In the Matter of Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates, MM Docket Nos. 90-4 and 84-1296 (filed Sept. 25, 1991).

provided increasingly less news and public affairs programming.<sup>19/</sup> And now, through imposition of retransmission consent, broadcasters are seeking to abandon as well their other obligation -- to provide free service.

Granting broadcasters the right to charge fees for retransmission consent might result in a second (or third) revenue stream for some of them.<sup>20/</sup> But cable subscribers would be receiving nothing new for those fees. And money paid to broadcasters for receipt of the same signal they already receive would inevitably be diverted away from diverse cable program services. Such a source of new dollars may grant broadcasters temporary relief from their poor programming and management decisions, but it would disserve television viewers.

Stripped of their hyperbole, NAB's comments do not deny that retransmission of broadcast signals by cable systems benefits broadcasters.<sup>21/</sup> Yet the broadcasters see that someone is making money for providing improved reception of their service, and they want some. They are, however, no more entitled to a share of

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19/ Comments of OC/UCC at 23; see also Comments of the United States Catholic Conference at 3 (noting "paucity of local news and public affairs programming offered by local station licensees . . . .")

20/ It should be noted that network affiliates already have access to a second revenue stream -- compensation from their program suppliers, the networks -- that cable operators do not.

21/ NAB, for example, now does not support repeal of the compulsory license, perhaps in recognition of the benefits the license provides its members.

this revenue than to a share of the revenues of television set, VCR or outdoor antenna manufacturers, all of which facilitate the viewing of broadcast signals by viewers whom the broadcasters are given free spectrum to serve.

IV. The Absence of Must Carry Rules Has Not Led to a Decline in Broadcasting.

Finally, the issue of whether to impose regulatory requirements to force cable operators to carry local stations that they might otherwise choose not to has been fully addressed in a separate proceeding, and NCTA does not intend to restate its arguments here about why must carry rules are unwarranted as a general matter. But for purposes of this proceeding -- in which broadcasters continue to seize upon must carry protection as "the single most significant action the Commission can take to help restore some balance to the video marketplace"<sup>22/</sup> -- it bears mentioning that there again is no evidence in any of the comments that the absence of must carry rules has had any effect whatsoever on the health of broadcasting. Instead, the vast majority of broadcast stations continue to be carried voluntarily by cable systems.

And while there is ample evidence of a decline in viewership of broadcast programming and in the quality of broadcast programming, that cannot be tied to the absence of mandatory carriage rules. Rather, any such decline seems to be the result

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<sup>22/</sup> Comments of NAB at 1 n.4; see also Comments of INTV at 4.

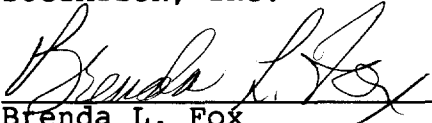
of audience fragmentation and poor management -- and not the lack of cable carriage. In any event, as the comments of OC/UCC make clear, television stations cannot claim that they satisfy some unique public service obligations that would warrant imposing must carry rules to protect them from cable competition.<sup>23/</sup>

CONCLUSION

For the foregoing reasons, the Commission should decline to support the unjustifiable measures proposed by broadcasters to protect them against their own poor business decisions.

Respectfully submitted,

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December 19, 1991

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<sup>23/</sup> Comments of OC/UCC at 28 ("in order to afford broadcasters the special protection they want, television licensees must first fulfill their public service mandate. The present programming performance of the industry does not entitle them to that protection.")